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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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TWOHY BROTHERS COMPANY, a Corporation,  
Plaintiff in Error,  
vs.  
WALTER ROGERS,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Arizona.

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FILED  
SEP 11 1908  
F. D. MONTGOMERY



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Plaintiff in Error,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

PAUL G. McIVER, Esq., Phoenix, Arizona,  
SAMUEL WHITE, Esq., Phoenix, Arizona,  
Messrs. BULLARD & JACOBS, Phoenix, Arizona,  
Attorneys for Plaintiff in Error.

FRED C. BOLEN, Esq., Phoenix, Arizona,  
SPENCER B. PUGH, Esq., Phoenix, Arizona,  
Attorneys for Defendant in Error.

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In the Superior Court of the State of Arizona in  
and for the County of Maricopa.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendants.

**Complaint.**

Now comes the plaintiff and for a cause of action  
against the defendant, complains and alleges:

**I.**

That defendant is now, and was at the time  
and times hereinafter mentioned, a corporation duly  
incorporated under the laws of the State of Arizona,  
and doing business as such corporation in the  
county of Maricopa and State aforesaid.

## II.

That the plaintiff is a resident of the County of Maricopa, and was at the times hereinafter mentioned a resident of said count and State.

## III.

That defendant company was, at the times hereinafter mentioned, engaged in the construction and building of public highways in the County of Maricopa, to wit; That certain portion of the public highway known as the Indian-School Road and at a point about three miles east of what is known as the "West End Store," and being situate at an (1) approximate distance of about twelve miles, more or less, west of the city of Phoenix, county of Maricopa, State of Arizona.

## IV.

That on and prior to the 25th day of March, 1921, plaintiff was an employee of said defendant company; that plaintiff's daily duties of said employment with said defendant company were to assist in connecting and making fast what is called and known in said business a bale, to cars or [1\*] buckets loaded with sand, gravel and cement, and to assist in guiding said bale and holding same in its proper place and position while said sand, gravel and cement, was being unloaded into what is known and called a skiff, and used for the conveyance of said sand, gravel and cement, to what is known and called the mixer.

## V.

That on or about the 25th day of March, 1921,

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\*Page-number appearing at foot of page of original certified Transcript of Record.

and while plaintiff was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without any fault, carelessness or negligence whatever upon the part of the plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; It did then and there at said time and place fail and neglect to properly place and locate said bale and said mixer in said highway, as aforesaid; that plaintiff was compelled to, in the performance of his regular duties and employment, as aforesaid, to push, haul and pull upon said bale, as to then and there, and at said time and place, receive great and severe bodily strain and internal injuries, to wit; a sprained back, a dislocation of the fifth lumbar vertebra, and a severe rupture and hemorrhoids.

## VI.

That by reason of the said injuries so received (2) as aforesaid, plaintiff has suffered and now does suffer extreme bodily pain; That prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries, and as a consequence thereof, plaintiff has been and now is, sick, sore and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain and anguish, and that he has been and now is unable to engage in any occupation to earn a livelihood whatsoever, and will forever remain maimed and crippled, and thereby incurring great loss and damage to the plaintiff in the sum of Ten Thousand Dollars (\$10,000). That by reason and

on [2] account of said injuries, as aforesaid, plaintiff has been further damaged in the sum of \$200.00 expended for medical services and treatment, such services and treatment being necessary for the relief of the pain and bodily suffering caused by said injuries; that plaintiff has been damaged by reason of the extreme physical pain, suffering and mental anguish due to said injuries. That by reason of said injuries so received, as aforesaid, plaintiff has been permanently injured and forever hindered from following his usual vocation and from engaging in any means of livelihood, to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the defendant company in the sum of \$20,000.00 and for his costs herein incurred.

FRED C. BOLEN,

Attorney for Plaintiff.

Plaintiff's Exhibit No. 1, admitted and Filed May 23, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. L-274, for Identification. Deft's. Ex. 1 for Identification, May 22, 1923.

[Endorsed]: No. 14149. Filed Apr. 23, 1921. Claude S. Berryman, Clerk. By Angie P. Byrne, Deputy. [3]

In the Superior Court of Maricopa County, State of  
Arizona.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Summons.**

The State of Arizona to Twohy Bros. Company, a  
Corporation, Defendant, GREETING:

YOU ARE HEREBY SUMMONED and required  
to appear in an action brought against you by the  
above-named plaintiff in the Superior Court of Mari-  
copa County, State of Arizona, and answer the com-  
plaint therein filed with the Clerk of said Court, at  
Phoenix, in said county, within twenty days after  
the service upon you of this summons, if served in  
this said county, or in all other cases within thirty  
days thereafter, the times above-mentioned being  
exclusive of the day of service, or judgment by de-  
fault will be taken against you.

Given under my hand and the seal of the Superior  
Court of Maricopa County, State of Arizona, this  
23d day of April, 1921.

[Seal]

CLAUDE S. BERRYMAN,

Cerk of said Superior Court.

By W. H. Linville,

Deputy Clerk.

Filed Apr. 30, 1921. Endorsed: No. 14149.  
Claude S. Berryman, Clerk. By Angie P. Byrne,  
Deputy.

State of Arizona,  
County of Maricopa,—ss.

I HEREBY CERTIFY that I received the within  
summons on the 25 day of Apr., A. D. 1921, at the  
hour of 10:10 A. M., and personally served the same  
on the 25 day of Apr., A. D. 1921, Twohy Bros. Co.,  
a Corp., being the same defendant named in said  
summons, by delivering to Geo. P. Bullard, State  
agent of said corporation in the County of Mari-  
copa, a copy of said summons, to which was at-  
tached a true copy of the complaint mentioned in  
said summons.

Dated this 25 day of April, A. D. 1921.

Fees, service .....	\$——
Copies .....	\$1.00
Travel —— miles .....	\$ .20
Publication .....	\$——
<hr/>	
Total .....	\$1.20

JOHN MONTGOMERY,

Sheriff,

By Ernest A. Smith,

Deputy Sheriff.

[Endorsed]: No. 14149. Superior Court of Mari-  
copa County, State of Arizona. Walter Rogers,  
Plaintiff, vs. Twohy Bros. Company, a Corporation,  
Defendant. Summons. Filed Apr. 30, 1921. Claude



S. Berryman, Clerk. By Angie P. Byrne, Deputy Clerk. Fred C. Bolen, Attorney for Plaintiff.

Received.

JOHN MONTGOMERY,

Sheriff,

By \_\_\_\_\_,

Deputy Sheriff.

1:30 P. M., Apr. 25, 1921. [4]

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In the Superior Court of Maricopa County, State of Arizona.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Petition for Removal to Federal Court.**

To the Honorable Superior Court of Maricopa County, State of Arizona;

Comes now the defendant, Twohy Brothers Company, a corporation, and by this petition respectfully shows to this Honorable Court;

That your petitioner is the defendant in the above-entitled action;

That said action has been commenced against defendant in said court by plaintiff, and that action is of a civil nature;

Said plaintiff in this complaint herein complains, in substance, that on the 25th day of March, 1921,

said plaintiff was in the employ of said defendant and that while in the employ of said defendant on said date, plaintiff was injured in his back, and sustained hemorrhoids and a rupture; that said accident was caused by the negligence of this defendant; and is brought under what is commonly known as the Common Law, and for which said plaintiff demands judgment in the sum of Twenty Thousand Dollars (\$20,000.00);

That said petitioner disputes said claim and denies all liability of the cause of action set out in the complaint herein; that the matter in dispute in this action exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs; that the controversy in this action and every issue of (1) fact involved therein is wholly between citizens of different states, and which can be fully determined as between them; that is to say, the plaintiff, Walter Rodgers, is now, and was at the time of the filing of the complaint in this action, a [5] citizen and resident of the State of Arizona, and the defendant, Twohy Brothers Company, a corporation, was then and still is a citizen and resident of the State of Oregon;

That the time for your petitioner and defendant in this action to answer or plead to the complaint in such action has not yet expired and will not so expire until the 14th day of May, 1921, and your petitioner has not yet filed any pleadings or in any way appeared therein;

Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, that they will enter into the United States



District Court of the District of Arizona, within thirty days from the filing of this petition, a certified copy of the record in this suit and for the payment of costs which may be awarded by the said Court, if the said District Court shall hold that this suit was wrongfully or improperly removed thereto;

Your petitioner, therefore, prays that this suit proceed no further herein, except to make the order of removal as required by law and to accept the bond herewith and direct a transcript of record herein to be made for said Court, as provided by law.

PAUL G. McIVER,  
Attorney for Defendant.

State of Arizona,  
County of Maricopa,—ss.

John Twohy, being first duly sworn, deposes and says that he is president of the Twohy Brothers Company, a corporation, the defendant in the above-entitled action, and that he has read the foregoing petition, and that the same is true of his own knowledge except as to such matters as are therein stated on information and belief, and as to such matters, he verily believes it to be true.

JOHN TWOHY.

Subscribed and sworn to before me this 9th day of May, 1921.

[Notary Seal]

E. P. WISE,  
Notary Public.

My commission expires Nov. 23, 1924. [6]

In the Superior Court of Maricopa County, State of  
Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Notice of Petition and Bond for Order of Removal.**

To Walter Rodgers, plaintiff, and Fred C. Bolen, his  
attorney:

You and each of you will please take notice that the defendant in the above-entitled action will, by its attorney, Paul G. McIver, on the 13th day of May, A. D. 1921, at the hour of 9:30 o'clock, or as soon thereafter as counsel may be heard, move the Court for an order removing said cause to the District Court of the United States for the District of Arizona, in accordance with the petition and bond of the defendant, copies of which are hereto attached.

PAUL G. McIVER,  
Attorney for Defendant.

Received copy of within papers 5-9-21.

FRED C. BOLEN,  
Atty. for Pltf.

[Endorsed]: No. 14149. Filed May 9, 1921.  
Claude S. Berryman, Clerk. By Angie P. Byrne,  
Deputy. [7]

In the Superior Court of Maricopa County, State of  
Arizona, Division No. 1.

Court convened at 9:30 A. M., Wednesday, May  
11, 1921.

Present: R. C. STANFORD, Judge; Claude S. Ber-  
ryman, Clerk; the Sheriff; the County Attorney  
and the Court Reporter.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS., a Corporation,

Defendants.

**Minutes of Court—May 11, 1921—Order Withdraw-  
ing Original Bond.**

Comes now Paul G. McIver, counsel for the de-  
fendant, and thereupon, it is ordered by the Court  
that the defendant be allowed to withdraw the  
original bond and substitute a new one therefor.

[8]

MARYLAND CASUALTY COMPANY,  
BALTIMORE.

BOND.

In the Superior Court of Maricopa County, State of  
Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Bond on Removal.**

Know All Men by These Presents:

That we, Twohy Brothers Company, a corporation as principal, and the Maryland Casualty Company, as surety, are held and firmly bound unto Walter Rodgers in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, for the payment of which to be well and truly made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

CONDITIONED, nevertheless, that;

WHEREAS, the said Twohy Brothers Company, a corporation, has applied to the Superior Court of the State of Arizona, in and for the County of Maricopa, for the removal of the cause pending therein, wherein the said Walter Rodgers is plain-

tiff and the said Twohy Brothers Company, a corporation, is defendant, to the United States District Court, for the District of Arizona, sitting in the City of Phoenix, in the said District and State, and that all further proceedings in said action in said State Court be stayed;

NOW, THEREFORE, if your petitioner shall file in the United States District Court for the District of Arizona, within thirty days from the filing of this petition for removal, a certified copy of the record of this suit, as required by law, and shall pay as costs to be paid, all costs that may be awarded therein by the said United States District Court, if said Court shall hold that the said suit was improperly or wrongfully removed thereto, then this obligation to be void; otherwise, to be and remain in full force and effect.

Dated this 7th day of May, A. D. 1921.

TWOHY BROTHERS COMPANY,

A Corporation.

By John Twohy,

President.

[Seal]

Twohy Brothers.

[Seal]

MARYLAND CASUALTY COMPANY.

MARYLAND CASUALTY COMPANY.

By W. H. THANSON,

Attorney in Fact.

Countersigned:

By FLOYD M. STAHL.

Attorney in Fact.

[Endorsed]: No. 14149. Filed May 11, 1921.  
Claude S. Berryman, Clerk. By Angie P. Byrne,  
Deputy.

Received copy this 11th day of May, 1921.

FRED C. BOLEN,  
Atty. for Pltf. [9]

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In the Superior Court of Maricopa County, State of  
Arizona, Division No. 1.

Court convened at 9:30 A. M., Thursday, May 12,  
1921.

Present: R. C. STANFORD, Judge; Claude S.  
Berryman, Clerk; the Sheriff; the County At-  
torney and the Court Reporter.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY,

Defendant.

**Minutes of Court—May 12, 1921—Petition for  
Removal of Cause.**

This matter comes on regularly this day to be  
heard upon the petition of the defendant for re-  
moval of this cause to the District Court of the  
United States for the District of Arizona, Fred C.  
Bolen appearing as counsel for the plaintiff and Paul  
G. McIver appearing as counsel for the defendant,  
and the Court being fully advised in the premises

accepts the bond of the said defendant, and it appearing that this is a proper cause for removal to the District Court;

It is ordered that no further proceedings be had in this cause and the removal of the same to the District Court of the United States for the District of Arizona be and the same is allowed over the objections of the plaintiff, and,

It is ordered in accordance with the said petition for removal heretofore filed and the statute of the United States in such cases made and provided.  
[10]

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In the Superior Court of Maricopa County, State of  
Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

### **Order for Removal.**

This cause coming on for hearing upon petition and bond of the defendant herein, for an order transferring this cause to the United States District Court in and for the District of Arizona, and it appearing to the Court that the defendant has filed his petition for said removal in due form of law, and that the defendant has filed his bond duly



conditioned with good and sufficient sureties, as provided by law; that defendant has given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal from the above court to the said District Court;

NOW THEREFORE, said petition and bond are hereby accepted and it is hereby ORDERED AND ADJUDGED that this cause be, and it hereby is, removed to the United States District Court for the District of Arizona, and the clerk is hereby directed to make the record in said cause for transmission to said court herewith.

Done in open court this 12th day of May, A. D. 1921.

R. C. STANFORD,  
Judge.

Received copy of within,

FRED C. BOLEN.

[Endorsed]: No. 14149. Filed May 14, 1921.  
Claude S. Berryman, Clerk. By Angie B. Byrne,  
Deputy. [11]

---

In the Superior Court of Maricopa County, State  
of Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corpora-  
tion,

Defendant.



**Notice of Removal.**

To Walter Rodgers, Plaintiff, and Fred C. Bolen,  
His Attorney:

You, and each of you, will please take notice that on the 12th day of May, 1921, an order of Court duly made, a copy of which is hereto attached, the above-entitled cause was duly transferred from the Superior Court of the County of Maricopa, State of Arizona, to the District Court of the United States in and for the District of Arizona, and that the record in said cause has this day been filed in said United States District Court.

PAUL G. McIVER,  
Attorney for Defendant.

Received copy of within.

FRED C. BOLEN.

[Endorsed]: No. 14149. Filed May 14, 1921.  
Claude S. Berryman, Clerk. By Angie P. Byrne,  
Deputy. [12]

---

In the Superior Court of Maricopa County, State  
of Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY,

Defendant.

**Clerk's Certificate.**

State of Arizona,  
County of Maricopa,—ss.

I, Claude S. Berryman, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the above and foregoing to be a full, true and complete copy and transcript of the record including all the minute entries and all proceedings had and entered of record in a certain cause lately pending in said Superior Court wherein Walter Rodgers was plaintiff and Twohy Brothers Company, a corporation, was defendant, as the same remains of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Phoenix, in said county and State, this 20th day of May, 1921.

[Seal]

CLAUDE S. BERRYMAN.

By W. H. Linville,

Deputy Clerk.

Transcript delivered to Clerk United States District Court, District of Arizona, this — day of —, 1921.

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Clerk Superior Court.

[Endorsed]: No. 14149. Copy Papers on Removal to United States District Court. Filed May 21, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

No. L-274—(Phoenix). (1. Complaint. 2. Summons. 3. Petition for Removal. 4. Notice of Petition and Bond. 5. Bond on Removal. 6. Order for Removal. 7. Notice of Removal. 8. All minute Entries.) [13]

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In the United States District Court in and for the  
District of Arizona.

No. —.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**First Amended Complaint.**

Now comes the plaintiff herein and for a cause of action against the defendant, complains and alleges:

I.

That plaintiff is a resident of Maricopa County, State of Arizona.

II.

That defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the Laws of the State of Arizona, and doing business as such corporation in the county of Maricopa and State aforesaid.

III.

That said defendant company was, at the times

hereinafter mentioned, engaged in the building and construction of Public Highways in the county of Maricopa, to wit: That portion of the public highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona. [14]

#### IV.

That on and prior to the 25th day of March, 1921, plaintiff herein was an employee of said defendant company; that plaintiff's duties of employment with said company, were in part, to assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one car or bucket attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being used to convey said sand, gravel and cement, to what is known and called in said business the "mixer." That plaintiff was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

#### V.

That on or about the 25th day of March, 1921,

and while plaintiff herein was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without fault, carelessness or negligence upon the part of plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; It then and there so carelessly and negligently located and placed the machinery hereinbefore designated as the "bale," in Paragraph IV herein, as to require of this plaintiff in the regular performance of his duties, to push, to haul, and pull upon said bale then and there connected and attached to (2.) said car or bucket loaded with sand, gravel and cement, as aforesaid, and to use unnecessary and severe bodily strength and physical strain, to make and complete the required and necessary connection between said bale and said skiff that was so required for the unloading of said sand, gravel and cement into said skiff to be conveyed to the said mixer, as hereinbefore mentioned. That the improper location and adjustment of the said bale and [15] machinery at said time and place as aforesaid, was the direct and proximate cause of plaintiff then and there receiving great and severe bodily strain and severe internal injuries, to wit; a sprained back, a dislocation of the vertebra, a severe rupture and hemorrhoids.

## VI.

That by reason of said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date

of said injuries, to wit: the 25th day of March, 1921, plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is, sick, sore and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain, and that he has been and now is unable to engage in any occupation to earn a livelihood, and will forever be maimed and crippled thereby incurring great loss and damage to this plaintiff in the sum of Ten Thousand Dollars (\$10,000.00).

That by reason and on account of said injuries, as aforesaid, this plaintiff has been further damaged in the sum of Five Hundred Dollars (\$500.00) expended for medical services, nursing and treatment, said medical services, (3.) nursing and treatment being required and necessary for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, this plaintiff has been permanently injured and forever hindered from following his usual vocation to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) Dollars and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.



## 1.

(Stamped: Defendant's Exhibit No. 2, for Identification. Admitted and Filed May 23, 1923. Case No. L-274—(Phoenix). C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk). Defts. Ex. 2, for Identification. May 22, 1923. [16]

Comes now the above-named plaintiff, Walter Rogers, by his attorney, and for a second and further cause of action against the defendant, Twohy Bros. Company, a corporation, complains and alleges:

## I.

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

## II.

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the Laws of the State of Arizona, and doing business as such corporation in the county of Maricopa, and State aforesaid.

## III.

That on and prior to the 25th day of March, 1921, said defendant company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was (4) and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used and operated in the building and construction of Public Highways in the county of Maricopa, to wit: that portion of

the Public Highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona.

#### IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in [17] connecting and making fast what is known and called in said business the "bale," to cars and buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one of said cars or buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there used to convey said sand, gravel and cement, to and into, what is known as and called in said business the "mixer," that plaintiff herein was so engaged in such duties of employment at the time of the accident and injury hereinafter described. (5.)



## V.

That said occupation in which said plaintiff, Walter Rogers, was employed at said time and place, as aforesaid, was hazardous as declared and determined by subdivision (10), of Section 3156, Chapter VI, Civil Code of Arizona, under which this action is instituted, and that said occupation was hazardous in fact.

## VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in [18] Paragraph IV herein, and to use severe bodily strength and physical strain, to make and complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while this plaintiff at said time and place was so laboring under the severe (6.) bodily and physical strain, to wit: pushing, pulling and hauling upon said bale, which said bale was then and there connected with said car or bucket loaded with sand, gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit, a sprained back, slight dislocation of the vertebra, a severe rupture and hemorrhoids.

## VII.

That by reason of said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain; that ever since the date of said accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and on account of said accident and injuries, as aforesaid, plaintiff has

been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, [19] nursing and treatment, such medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, plaintiff has been permanently injured and forever hindered from following his usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand Five Hundred (\$20,500.00) Dollars, and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

[Endorsed]: No. L-274 — (Phoenix). First Amended Complaint. Filed May 21, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

Received copy of within complaint this — day of May, 1921. Paul G. McIver, Att. for Defendant Company. [20]

In the District Court of the United States in and  
for the District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Demurrer and Answer to Plaintiff's First Cause of  
Action and Motion to Strike, Demurrer and  
Answer to Plaintiff's Second Cause of Action.**

COMES NOW the defendant herein and answering the first cause of action of plaintiff's first amended complaint demurs thereto upon the following grounds:

I.

That the said cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays judgment of this Court that plaintiff take nothing by his said first cause of action and that defendant may go hence with its costs.

PAUL G. McIVER,  
Atty. for Deft.

Should said demurrer be overruled but without waiving the same, defendant further answering the said first cause of action of plaintiff's first amended complaint, admits, denies and alleges as follows, to wit:

I.

Defendant denies both generally and specifically, all and singular, the allegations contained in the said first cause of action of plaintiff's first amended complaint.

II.

And further answering the said first cause of (1.) action of plaintiff's first amended complaint, defendant alleges that the injuries to plaintiff, if any there were, were caused by a risk incident in and necessary to said employment of plaintiff and that plaintiff entered, and continued in the employment of [21] the defendant with full knowledge of said risk, and the plaintiff thereby assumed the risk of said employment.

III.

Further answering, defendant alleges that the injuries of plaintiff, if any there were, were caused by plaintiff's own negligence, and that the proximate cause of plaintiff's injuries, if any there were, was the negligence of the plaintiff and that plaintiff's negligence contributed thereto.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by his said action and that defendant may go hence with its costs.

PAUL G. McIVER,  
Attorney for Defendant.

Comes now the defendant and moves the Honorable Court to strike all of the second cause of action of plaintiff's first amended complaint, from the files, on the following grounds:

## I.

That, heretofore, on the 21st day of April, 1921, in the Superior Court of the State of Arizona, in and for the county of Maricopa, the plaintiff filed his complaint in the above-entitled action, and that said complaint set up a cause of action under the Common Law. That the plaintiff by so filing his said complaint, elected to pursue his said remedy at Common Law, to the exclusion of all other remedies.

Wherefore, defendant prays that the said second cause of action of plaintiff's first amended complaint be stricken from the files herein and that said second (2.) cause of action be dismissed.

PAUL G. McIVER,  
Attorney for *Plaintiff*. [22]

Should the above motion to strike be denied, but without waiving the same, defendant demurs to the said second cause of action of plaintiff's first amended complaint on the following grounds:

## I.

That said second cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE defendant prays that plaintiff take nothing by his said amended complaint and that defendant may go hence with its costs.

PAUL G. McIVER,  
Attorney for Defendant.

Further answering the said second cause of action of plaintiff's complaint, defendant admits, denies and alleges as follows:



I.

Defendant denies, both generally and specifically, all and singular, the allegations contained in said second cause of action of plaintiff's first amended complaint.

II.

Defendant alleges that the injuries of plaintiff, if any there were, were caused solely by the negligence of the said plaintiff.

Wherefore, defendant prays that plaintiff take nothing by his said action and for costs.

PAUL G. McIVER,  
Attorney for Defendant.

[Endorsed]: Answer, Demurrer, and Motion to Strike. Received Copy 6-17-21, Fred C. Bolen, Atty. for Pltf.

Filed June 17, 1921. C. R. McFall, Clerk. By Patrick D. Madden, Deputy Clerk. [23]

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Regular May Term 1921—at Tucson.

In the United States District Court, in and for  
the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United  
States District Judge, Presiding.  
(Minute Entry of October 17, 1921.)

No. L-274—(PHOENIX).

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS (a Corporation),  
Defendant.

**Minutes of Court—October 17, 1921—Order Granting Plaintiff Leave to Amend Complaint.**

ORDERED, that the plaintiff be and is hereby granted leave to amend his complaint as of May 21st, 1921, by adding the second cause of action under the Employer's Liability Law of Arizona, and that the defendant's motion to strike said second cause of action from the files be and the same is hereby overruled.

IT IS FURTHER ORDERED that defendant's demurrer to said second cause of action be and the same is hereby overruled. Plaintiff's counsel stated in argument that if the Court allowed the amendment to the complaint by adding thereto the said second cause of action, plaintiff would elect to proceed to trial on said second cause of action.  
[24]

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In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.



**Notice of Motion for Leave to Amend.**

To Twohy Bros. Company. Messrs. Bullard & Jacobs, and McIver, Esqs., Their Attorneys:

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned will move the Court, at the courtroom thereof, at Phoenix, Arizona, on the 14th day of December, 1921, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his first amended complaint herein, by the insertion of the following words, to wit:

*Severe injuries to the Vertebral Column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injury to the blood vessels, nerves. muscles and ligaments adjacent thereto, also—* After the word—to wit; on line four, of page four, and the insertion of the following words, *about without experiencing severe bodily fatigue;* After the word walk, on line seventeen, of page four thereof, and for such other and further relief as may be just.

FRED C. BOLEN,  
Attorney for Plaintiff.

Dated this 14th day of December. 1921. [25]

In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Motion for Leave to Amend.**

Comes now the plaintiff, in the above-entitled cause, by his attorney, Fred C. Bolen, and moves this Court for an order for leave to amend his first amended complaint on file herein by the insertion of the following words, to wit:

*Severe injuries to the Vertebral Column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also—*  
After the word to wit; on line four, of page four.  
And leave to insert the following words, to wit;  
*about without experiencing severe bodily fatigue;*  
After the word walk, on line seventeen, of page four thereof.

FRED C. BOLEN,  
Attorney for Plaintiff.

Dated this 14th day of December, 1921. [26]

In the United States District Court in and for the  
District of Arizona.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Affidavit of Fred C. Bolen.**

Fred C. Bolen, being first duly sworn, deposes and says: that he is the attorney for the plaintiff, Walter Rogers, in the above-entitled action, that he is more familiar with the matters herein stated than said plaintiff and makes this affidavit for and in his behalf; that said action was commenced in the Superior Court of Maricopa County, State of Arizona, on the 21st day of April, 1921, and was transferred to this court by the said defendant company, on the 21st day of May, 1921, and is brought for the purpose of recovery of damages for personal injuries alleged to have been received and sustained by the plaintiff, Walter Rogers, while in the service and employ of the said defendant company. That issue has been joined and the cause is now upon the calendar of this Court awaiting trial.

That it becomes necessary for the plaintiff to file an amended complaint in this action, for the following reasons, to wit:

That on or about the 3d day of November, 1921, and upon the application filed in this court by said

defendant company, and under and by virtue of Chapter 131, of the Session Laws of Arizona, 1921, 'authorizing and empowering Courts in personal injury cases to order and direct a physical examination (1.) of the person injured, this Court entered an order appointing and directing Dr. Coit Hughes, of Phoenix, Arizona, to make a physical examination of the plaintiff, Walter Rogers, [27] on behalf of the defendant, Two Bros. Company. That on the 25th day of November, 1921, said examination was had and X-ray photos made of plaintiff's alleged injuries. That the said X-ray photos so taken of the plaintiff's "Vertebral Column," have enabled affiant to more specifically set forth in the proposed second amended complaint the injuries alleged to have been so received by said plaintiff.

That the plaintiff and this affiant was ignorant of the facts as herein stated when his former complaint herein was filed in this court.

FRED C. BOLEN.

Subscribed and sworn to before me this 14th day of December, 1921.

[Notarial Seal]            SPENCER B. PUGH,  
Notary Public.

My commission expires 10-30-1922.

[Stamped: Plaintiff's Exhibit No. 4. Admitted and Filed May 23, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. L-274.] [28]

In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Second Amended Complaint.**

Comes now the above-named plaintiff, Walter Rogers, by his attorney, Fred C. Bolen, and for a cause of action against the defendant, Twohy Bros. Company, a corporation, complains and alleges:

**I.**

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

**II.**

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the County of Maricopa, and State aforesaid.

**III.**

That on and prior to the 25th day of March, 1921, said defendant company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being

used to operate the machinery and appliances in and about said plant, which said plant was then and there to wit; on the 25th day of March, 1921, being used and operated in the building and construction of public highways in (1.) the county of Maricopa, to wit; That portion of the public highway known as the Indian Road and at a point about three miles east of what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona. [29]

#### IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one of said cars or buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there



used to convey said sand, gravel and cement, to and into, what is known as and called in said business the "mixer." That plaintiff herein was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

#### V.

That the said occupation in which said plaintiff Walter Rogers, was employed at said time and place, as aforesaid (2.) was hazardous as declared and determined by subdivision (10), of Section 3156. Chapter VI, Civil Code of Arizona,\* under which this action is instituted, and that said occupation was hazardous in fact.

#### VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment. [30]

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in Paragraph IV herein, and to use severe bodily strength and physical strain, to make and



complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while this plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit; pushing, pulling and hauling upon (3.) said bale, which said bale was then and there connected with said car or bucket loaded with sand, gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit; severe injuries to the vertebral column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also rupture and hemorrhoids.

## VII.

That by reason of the said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk about without experiencing severe bodily fatigue; that ever since the date of said

accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, [31] and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and account of said accident and injuries, as aforesaid, plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, nursing and treatment, such medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, plaintiff has been permanently injured and forever hindered from following his (4.) usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) Dollars, and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

[Endorsed]: No. L-274. Second Amended Complaint. Received Copy of Within this — day of December, 1921. G. P. Bullard, Attorney for Defendant.

Filed Dec. 12, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

[Stamped: Ptf's Exhibit No. 3, for Identification. Admitted and Filed May 23, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. L-274. Deft's Ex. 3 for Identification. May 22, 1923.] [32]

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In the District Court of the United States in and  
for the District of Arizona.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corpora-  
tion,

Defendant.

**Motion to Strike Demurrer and Answer to Plain-  
tiff's Second Amended Complaint.**

Comes now the defendant and moves the Honorable Court to strike all of the plaintiff's second amended complaint from the files, on the following grounds:

**I.**

That, heretofore, on the 21st day of April, 1921, in the Superior Court of the State of Arizona, in and for the county of Maricopa, the plaintiff filed his complaint in the above-entitled action, and that said complaint set up a cause of action under the Common Law. And that at said time, plaintiff failed to file any cause of action under the Employer's Liability Law of the State of Arizona. That

the plaintiff by so filing his said complaint, elected to pursue his said remedy at Common Law, to the exclusion of all other remedies.

Wherefore, defendant prays that the said second amended complaint, setting up a cause of action under the Employer's Liability Law of the State of Arizona, be stricken from the files and that defendant go hence with its costs.

PAUL G. McIVER,  
BULLARD & JACOBS,  
Attorneys for Defendant.

Should the above motion to strike be denied, but , [33] without waiving the same, defendant demurs to the said second amended complaint, on the following grounds:

I.

That said second cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that plaintiff take nothing by his said second amended complaint and that defendant may go hence with its costs.

PAUL G. McIVER,  
BULLARD & JACOBS,  
Attorneys for Defendant.

Further answering the said second amended complaint, defendant admits, denies and alleges as follows:

I.

Defendant denies, both generally and specifically, all and singular, the allegations contained in plaintiff's second amended complaint.

## II.

Defendant alleges that the injuries of plaintiff, if any there were, were caused solely by the negligence of the said plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by his said second amended complaint, and that defendant may go hence with its costs.

PAUL G. McIVER,  
BULLARD & JACOBS,  
Attorneys for Defendant.

[Endorsed]: L-274. Answer to Second Amended Complaint. Rec'd Copy, this 20 day of December, 1921. Fred C. Bolen. By Thos. J. Croaff, Attorney for Pltf.

Filed Dec. 20, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [34]

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In the United States District Court in and for the  
District of Arizona.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Affidavit for Leave to Amend.**

Fred C. Bolen, being first duly sworn, deposes and says: That he is the attorney for the plaintiff, Walter Rodgers, in the above-entitled action; that he is more familiar with the matters herein stated

than said plaintiff and makes this affidavit for and in his behalf. That said action was commenced in the Superior Court of Maricopa County, State of Arizona, on the 21st day of April, 1921, and was transferred to this court by the said defendant company on the 21st day of May, 1921, and is brought for the purpose of recovery of damages for personal injuries alleged to have been received and sustained by the plaintiff, Walter Rodgers, while in the service and employment of the said defendant company; that issue has been joined and the cause is now upon the calendar of this court awaiting trial. That it is necessary for the plaintiff to file further amended pleading in this action for the following reasons, to wit:

First. That because of the time elapsed since the date of the alleged injury, to wit, March 25th, 1921, and the further time that will necessarily elapse before trial can be had in the premises it will be necessary for plaintiff to amend his second amended complaint now on file in said cause more particularly with reference to plaintiff's physical condition.

Second. That since the date of filing plaintiff's second amended complaint, to wit, the 12th day of December, 1921, [35] examination has been had of the machinery and appliances in and about the premises of the defendant company, wherein plaintiff received said alleged injuries; that as a result of said examination so had plaintiff will be enabled to more particularly set forth and allege his allegations relative to the alleged accident, said allega-



tions being now absent in the second amended complaint on file in said cause.

Third. That on the 3d day of November, 1921, this Court entered an order appointing and directing Dr. Coit Hughes, of Phoenix, Arizona, to make a physical examination of the plaintiff, Walter Rodgers, on behalf of the defendant, Twohy Brothers Company; that on the 25th day of November, 1921, said examination was had and X-ray photos made of the plaintiff's alleged injuries; that thereafter and since the filing of plaintiff's second amended complaint, to wit, the 12th day of December, 1921, further physical examination have been made of the plaintiff, Walter Rodgers, by Dr. Win Wylie and by Dr. W. O. Sweek, of Phoenix, Arizona; that because of said physical examination so had by said Dr. Coit Hughes, Dr. Win Wylie and Dr. W. O. Sweek, and because of said X-ray photos so made disclosing plaintiff's alleged injuries and the physical condition of the plaintiff arising out of said alleged accident plaintiff is advised and so believes that the amount of damages as prayed for in his second amended complaint is wholly inadequate in the premises.

That the plaintiff and this affiant was ignorant of the facts as herein stated when his second amended complaint herein was filed in this court.

FRED C. BOLEN.

Subscribed and sworn to before me this 17th day of July, 1922.

[Seal]

J. B. WOODWARD,  
Notary Public.



My commission expires the 16th day of February, 1924.

[Endorsed]: No. L-274. Affidavit for leave to Amend. Filed July 17, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy Clerk.

Received copy of within this 17 day of July, 1922.

PAUL G. McIVER,

Atty. for Deft. [36]

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In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Notice of Motion for Leave to Amend Second  
Amended Complaint.**

To Twohy Bros. Company, Messrs. Bullard and  
Jacobs, and McIver, Esqs., Their Attorneys.

You, and each of you, will please take notice that upon the files and records in this action, the undersigned will move the Court, at the courtroom thereof, at Phoenix, Arizona, on the 15th day of July, 1922, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard,

for an order for leave to amend his second amended complaint.

FRED C. BOLEN,  
Attorney for Plaintiff.

Dated this 14th day of July, 1922.

Filed July 15, 1922. C. R. McFall, Clerk. [37]

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In the United States District Court in and for the  
District of Arizona.

No. —.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Third Amended Complaint.**

Comes now the above-named plaintiff, Walter Rogers, by his attorney, Fred C. Bolen, and for a cause of action against the defendant, Twohy Bros. Company, a Corporation, complains and alleges:

**I.**

That plaintiff herein is a resident of Maricopa County, State of Arizona; that the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the county of Maricopa, and State of Arizona.

## II.

That on and prior to the 25th day of March, 1921, said defendant company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used and operated in the building and construction of public highways (1) in the County of Maricopa, viz: That certain public highway known as and called the Indian Road and at a point approximately twelve miles, more or less, in a westerly direction from the City of Phoenix in the County of Maricopa and State of Arizona. [38]

## III.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment were in part to connect and assist in connecting and making fast thereto what is known as and called in said business the "bale," to what is known as and called cars or buckets, said cars or buckets being then and there loaded with sand, gravel and cement, and to assist in guiding and holding said bale with said car or bucket attached thereto in its place and position while said car or bucket was then and there being lifted by said bale and being unloaded of said sand, gravel and cement into what is known

as and called in said business the "skiff," said skiff being used to convey said sand, gravel and cement to and into what is known as and called the cement mixer. That plaintiff herein was so engaged in such duties of employment at the time of the accident and injuries hereinafter set forth and described.

#### IV.

That said occupation in which this plaintiff was employed at said time and place, as aforesaid, was hazardous as declared and determined by subdivision Ten (10), of Section 3156, Chapter VI, Civil Code of Arizona, under which this action is instituted and that said occupation was hazardous in fact.

#### V.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employment and service of said defendant company, and while he was then and there so engaged in and about the performance of his regular duties of employment in and about said plant, machinery and appliances, as aforesaid, plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising [39] out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul and pull upon said bale and while said bale was then and there attached to said car or bucket loaded with said sand, gravel and cement

as hereinbefore set forth and described and to use severe bodily strength and physical strain to make and complete the required and necessary connection between the said bale and the said skiff that was so required in the operation of unloading of said sand, gravel and cement from said car or bucket into the said skiff to be thereafter conveyed into the mixer.

That while so employed with his said duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit; pushing, pulling and hauling upon said bale with attached car or bucket loaded with sand, gravel and cement, as aforesaid, the accident occurred wherein plaintiff slipped and lost his footing causing plaintiff to fall. That by reason of said severe bodily and physical strain, slipping, loss of footing and fall, plaintiff sustained and suffered severe (3) injuries, to wit; Severe injuries to the vertebral column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, together with rupture and hemorrhoids.

## VI.

That by reason of said injuries so received, as aforesaid, plaintiff has suffered and now does suffer and will continue to suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed

the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk about without suffering severe bodily [40] fatigue, and will forever remain maimed and crippled. That by reason of and account of said accident and said injuries so received plaintiff has been compelled to expend and obligate himself in the sum of Five Hundred (\$500) Dollars, for medical services, nursing and treatment, said medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries. That by reason of and account of said injuries so received, plaintiff has been permanently injured and incapacitated from following his usual occupation and from earning the wages which he otherwise would have earned, to wit; Four to Five Dollars per day, all to his great damage in the premises in the sum of Twenty Thousand Five Hundred (\$20,500) Dollars.

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand Five Hundred Dollars (\$20,500.00), and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

[Endorsed]: No. L-274. Third Amended Complaint. Filed Dec. 12, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk.



Received copy of within this 14th day of July,  
1922.

PAUL G. McIVER,  
Attorney for Defendant. [41]

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In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS, a Corporation,

Defendant.

**Defendant's Objection to Plaintiff's Motion for  
Leave to Amend.**

Comes now the defendant, by its attorneys, Paul G. McIver and Bullard & Jacobs, and objects to the filing of plaintiff's third amended complaint, and moves the Court that the said third amended complaint be stricken from the files for the following reasons:

I.

That the affidavit in support of plaintiff's motion for leave to amend is insufficient to warrant the court in granting said motion.

II.

That the proposed third amended complaint of plaintiff does not conform, and is not amended in accordance with the affidavit in support of plain-



tiff's motion, in the following particulars: That there is no amendment in plaintiff's third amended complaint concerning plaintiff's physical condition.

III.

That the only place wherein plaintiff's third amended complaint is a material amendment to plaintiff's second amended [42] complaint, is found in the last four lines on page three of the said third amended complaint, and there is no reason set forth in plaintiff's affidavit in support of his motion to amend for such amendment.

IV.

That the proposed third amended complaint of plaintiff is sham, false and untrue.

V.

Defendant further objects to the filing of said proposed third amended complaint, and for plaintiff's motion for leave to amend, on the ground that at the commencement of this action plaintiff elected, by filing his complaint in the Superior Court of the County of Maricopa, State of Arizona, under the common law, to pursue his said remedy under the common law, to the exclusion of all other remedies, and that plaintiff is bound by said election.

WHEREFORE, defendant prays that the proposed third amended complaint of plaintiff be not allowed, and if the same has been filed, that it be stricken from the files in this case.

PAUL G. McIVER,  
BULLARD & JACOBS,  
Attorneys for Defendant.

[Endorsed]: No. L—274. Defendant's objection to Plaintiff's Motion for Leave to Amend. Recd. Copy this 25th day of July, 1922. F. C. Bolen. T. J. C. Atty. for Pltf.

Filed July 25, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy Clerk. [43]

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In the United States District Court in and for the  
District of Arizona.

No. L—274.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS, a Corporation,

Defendant.

**Affidavit in Support of Defendant's Objection to  
Plaintiff's Notice to Amend.**

State of Arizona,  
County of Maricopa,—ss.

Paul G. McIver, first being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and as such he is more familiar with the matters herein stated than defendant, and makes this affidavit in behalf of the above-named defendant; that he has made thorough investigations of the facts and evidence of the alleged accident set forth in plaintiff's second amended complaint, and that he has inter-

viewed numerous witnesses who were employed by the defendant company, and were fellow servants with the plaintiff in this action, and this affiant is informed by said witnesses and believes that the plaintiff at the time of the alleged accident, suffered no accident whatever; that he did not lose a footing while employed by the defendant company, particularly at the time alleged in [44] plaintiff's proposed third amended complaint, and that he did not fall.

Affiant further states that the allegations in plaintiff's proposed third amended complaint, found in the last four lines on page three of said third amended complaint, to his knowledge and belief are false and untrue.

PAUL G. McIVER.

Subscribed and sworn to before me this 24th day of July, A. D. 1922.

[Seal]

C. F. GERARD,  
Notary Public.

My commission expires Jan. 17, 1924.

[Endorsed]: No. L—274. Affidavit in Support of Defendant's Objection to Plaintiff's Motion to Amend. Recd. Copy this 25 day of July, 1922. F. C. Bolen, Atty. for Pltf.

Filed July 25, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy Clerk. [45]

In the United States District Court in and for the  
District of Arizona.

No. L-274—PHX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant,

**Instructions Requested By Defendant. (1.)**

**I.**

The plaintiff having failed to prove his case, you  
are instructed to return a verdict for the defendant.

Given \_\_\_\_\_.

Refused F. C. JACOBS, Judge. (2.)

**II.**

The defendant in this case by its answer, denies  
all of the allegations of plaintiff's complaint, and  
denies that plaintiff was injured as alleged, or in-  
jured at all, and alleges that if plaintiff was injured  
to any extent, it was by reason of his own negli-  
gence, and if you find from the evidence that the  
plaintiff was guilty of negligence at the time he  
sustained the alleged injuries, and if you find fur-  
ther that such negligence was the proximate cause  
of his alleged injuries, then your verdict must be  
for the defendant.

Given \_\_\_\_\_.

Refused covered by other instructions

F. C. JACOBS,  
Judge. (3.) [46]

## III.

I charge you, that before the plaintiff can recover under the Arizona Employer's Liability Law, he must sustain by the evidence, that he was employed by the defendant in an occupation declared by said Employer's Liability Law to be hazardous, and that while engaged in the performance of the duties required of him he was injured, and that the injury was caused by an accident due to a condition or conditions of such employment and that it was not caused by his own negligence. Those are the burdens which the plaintiff must discharge and he cannot recover unless he proves by a preponderance of the evidence, each of the foregoing facts. If the plaintiff has failed to so prove any one of the above-mentioned facts, he has failed to establish his right of recovery and your verdict must be for the defendant.

Given \_\_\_\_\_.

Refused covered by other instructions

F. C. JACOBS,

Judge. (4.)

## IV.

The first question for you to consider is whether or not it is established by the evidence that the plaintiff was at the time mentioned in the complaint, engaged in a hazardous occupation as defined by the Employer's Liability Law. If the plaintiff has failed to prove by a preponderance of the evidence that he was at said time engaged in an occupation declared to be hazardous, then he cannot recover and your verdict must be for the defendant.

I charge you further to consider whether or not the accident was due to a condition or conditions of the employment and if you find that the plaintiff has failed to prove by a preponderance of the evidence that the accident was due to a condition of employment, then he cannot recover.

Given \_\_\_\_\_.

Refused covered by other instructions

F. C. JACOBS,  
Judge. (5.) [47]

V.

Before the plaintiff can recover under the terms of the Act, he must show that his injuries, if he was injured, were due to an accident arising out of and in the course of his employment in an occupation declared by the Act to be hazardous. The words "arising out of" refer to origin or cause of the injury, and the words "in the course of" refer to the time, place and circumstances under which the accident causing the injury occurred. Unless you find from the evidence in this case that the accident to the plaintiff, causing the injury, was one arising out of and in the course of his employment, and at the time of his injury, if he was injured, he was engaged in a hazardous occupation, your verdict must be for the defendant.

Given \_\_\_\_\_.

Refused partly covered by other instructions

F. C. JACOBS,  
Judge. (6.)

VI.

If you find from the testimony that the plaintiff



at the time and place mentioned in the complaint, while engaged in the performance of his duties sustained the injury or injuries set up in the complaint, and that such injury or injuries were not caused by or were not the result of his negligence and were caused by an accident due to a condition or conditions of employment, then you will next consider the nature and extent of his injury or injuries so sustained, if any. In this connection the burden of proof is upon the plaintiff to show by a preponderance of the evidence, not only the material allegations of his complaint, but to prove in a like manner that the injuries, defects and afflictions of which he complains, or some of them of which he complains, are the proximate result of said accident, and, of course, plaintiff cannot recover for any injuries other than those which he has shown by a preponderance of the evidence to have been sustained at the time of the accident, or such as are reasonably certain to follow as a result of the accident. [48]

You are instructed that in order to justify a verdict for the plaintiff for damages for future consequences of the injury, the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury will not warrant a verdict for such damages. Therefore, if the evidence goes no further than to indicate that some future consequences may or probably will



follow as a result of the injury, then you are not to award any damage for such future consequences.

Given

F. C. JACOBS,

Judge.

Refused —————. (7.)

VII.

In the ascertainment of damage the law does not lay down any mathematical or definite rule. It says that you, the jury, must determine that matter and that in so doing that you must use sound judgment and good sense and make such an award as would be just compensation for the injury or injuries so sustained; no more and no less. You are not to give anything to the plaintiff because of his age or through sympathy, or because the defendant is a corporation, but you are to decide this case just the same as if it was an action between two individuals, and you are not to determine it, fix any damages or to give any damages at all by reason of the fact that the defendant is a corporation. In other words, you are to decide the case absolutely impartially, regardless of consequences, and whether it is pleasing to one side or the other. You are here to see that justice is done between these litigants, and when litigants cannot agree and go into court, then it is the duty of the court and jury to determine their controversy and to do justice between them as nearly as may be.

Given

F. C. JACOBS,

Judge.

Refused —————. (8.) [49]

## VIII.

The jury is instructed that Rodgers, the plaintiff in this case, cannot in any event recover for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find from the evidence that he sustained injury at the time of the accident. And, if you find, from the evidence, that the plaintiff has now or has had any other disability resulting from conditions which existed in the plaintiff prior to said accident and of which the accident in question was not the proximate cause, then you are not permitted by law to allow anything for such disability and should not do so from motives of sympathy or from any other motive.

Given

F. C. JACOBS,  
Judge.

Refused \_\_\_\_\_.

Respectfully submitted,

PAUL G. McIVER and G. P. BULLARD,  
Attorneys for Defendant.

[Endorsed]: No. L-274-Phx. Instructions requested by Defendant. Filed May 24, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [50]

L-274 (PHOENIX).

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Verdict.**

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at \$5250.00 dollars.

H. O. RAMSEY,  
Foreman.

[Endorsed]: No. L-274 Phx. Verdict. Filed May 25th, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [51]

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In the District Court of the United States in and  
for the District of Arizona.

No. L-274—PHX.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**Defendant's Motion for New Trial.**

Comes now the defendant, above named, by its attorneys, and respectfully moves the Honorable Court to set aside and vacate the verdict of the jury in this action, and to grant a new trial thereof.

Said motion is made upon the following grounds and for the following causes, to wit:

1. That the Court erred in admitting evidence over the objection of the defendant and excepted to by the defendant.
2. That errors of law occurred at the trial and during the progress of the cause.
3. That the Court erred in instructing the jury.
4. That the Court erred in refusing instructions requested by the defendant.
5. That the verdict is not justified by the evidence and is contrary to law.

PAUL G. McIVER and G. P. BULLARD,  
Attorneys for Defendant.

[Endorsed]: No. L-274 — P h x. Defendant's Motion for New Trial. Rec'd Copy this 31st day of May, 1923. Fred C. Bolen, Attorney for Pltf.

Filed C. R. McFall, Clerk. May 31, 1923. United States District Court for the District of Arizona. By Chas. H. Adams, Deputy Clerk. [52]

In the District Court of the United States for the  
District of Arizona.

No. L-274—PHX.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Order Extending Time to and Including July 15,  
1923, to File Bill of Exceptions.**

IT IS HEREBY ORDERED that the defendant,  
Twohy Brothers Company, shall be allowed to and  
including the fifteenth day of July, 1923, within  
which to present and file its bill of exceptions in the  
above-entitled matter.

F. C. JACOBS,  
Judge.

[Endorsed]: No. L-274—Phx. Order Fixing  
Time for Filing Bill of Exceptions. Filed C. R.  
McFall, Clerk. June 18, 1923. United States Dis-  
trict Court for the District of Arizona. By Paul  
Dickason, Chief Deputy Clerk. [53]

United States of America, District Court of the  
United States, District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY,

Defendant.

### **Judgment.**

This cause coming on to be heard before the Court and a jury on the 21st day of May 1923, said cause having been duly set for trial on said day, and the plaintiff being present in person and by his attorneys, Fred C. Bolen, Spencer B. Pugh and Win Wylie, and the defendant being present by its attorneys G. P. Bullard and Paul McIver;

And both parties having announced ready for trial, witnesses were sworn, after a jury was duly impaneled and sworn, and the testimony taken in behalf of the plaintiff and the defendant, and the hearing of said cause continued during the 22d, 23d and 24th of May, 1923, and on said both parties having rested and arguments of counsel having been heard, the Court having instructed the jury and the jury retired to consider their verdict;

Thereupon, on the 25th day of May, 1923, the jury returned into open court their verdict in the words and figures, to wit:



(Title and Venue of Cause.)

We, the jury impaneled and sworn in the above-entitled action upon our oaths do find for the plaintiff and assess his damages at \$5250 Dollars.

H. O. RAMSEY,

Foreman. [54]

And said verdict having been duly recorded, in consideration of the premises and the verdict of the jury,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Walter Rogers, do have and recover of and from the defendant, Twohy Bros. Company, a corporation, the sum of Five Thousand Two Hundred and Fifty (\$5,250) Dollars, together with costs of suit in the sum of \$68.95 Dollars; for which let execution issue.

Done in open court on this 25th day of May, 1923.

F. C. JACOBS,

Judge.

O. K. as to form—G. P. BULLARD,

Atty. for Deft.

[Endorsements]: No. L-274—Phx. Judgment. Received Copy on this 13 day of May, 1923, and Approved as to Form. G. P. Bullard, Attorneys for Defendant.

Filed C. R. McFall, Clerk. June 21, 1923. By Chas. H. Adams, Deputy Clerk. [55]

In the District Court of the United States, for the  
District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Petition for Writ of Error.**

Comes now Twohy Brothers Company, a corporation, defendant in the above-entitled action, and represents to the Court that on the twenty-fifth day of May, 1923, a verdict in the sum of Five Thousand Two Hundred Fifty (\$5,250.00) Dollars in favor of the plaintiff and against the defendant was returned into court by a jury in the above-entitled cause, and on said date the Court gave judgment upon said verdict in said sum against this defendant and in favor of the plaintiff, and further represents that in the orders made and entered by the above-entitled court permitting the plaintiff to amend his complaint by setting up a new cause of action under the Employers' Liability Law of the State of Arizona after having brought his action under the common law, and in the rulings of the Court permitting evidence to be introduced under such amended pleadings, and in the rulings of the Court with respect to the giving of certain instructions based upon said Employers' Liability

Law over the objection of the defendant, and in the rulings of the Court refusing certain instructions requested by the defendant, and in the judgment entered in favor of the plaintiff upon said verdict, certain errors were committed to the prejudice of the defendant, all of which will in more [56] detail appear from the assignments of error filed herewith.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceeding and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

RICHARD E. SLOAN, C. R. HOLTON, and  
E. G. SCOTT, and PAUL G. McIVER,  
Attorneys for Defendant. [57]

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In the District Court of the United States for the  
District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Assignments of Error.****ASSIGNMENT No. I.**

The Court erred in denying defendant's motion to strike from the files the second cause of action set forth in plaintiff's first amended complaint for the following reasons:

That the plaintiff, a workman, brought suit in the Superior Court of Maricopa County, Arizona, against the defendant, his employer, asking in his original complaint for damages for personal injuries alleged to have been sustained while in the service of such employer and based such action upon the alleged negligence of the defendant under the common law. An employee who is injured in the course of his employment in what is designated by such law as a hazardous occupation has open to him three separate and distinct avenues of redress, any one of which he may pursue. They are: The common law liability for negligence; the Employers' Liability Law, and the Compulsory Compensation Law.

The law of the State of Arizona, however, provides that any suit brought by the workman for a recovery shall be held to be an election to pursue such remedy exclusively. The plaintiff having chosen to bring his action [58] originally under the common law has, under the Arizona statute, elected to pursue that remedy exclusively and is precluded from a recovery under any of the other remedies theretofore open to him. The second cause of action set forth in plaintiff's first amended

complaint attempts expressly to state facts bringing it within the Employers' Liability Law of the State of Arizona.

Inasmuch as plaintiff was precluded from a recovery under such law the said second cause of action constitutes surplusage and should have been stricken and the Court erred in refusing to strike the same.

#### ASSIGNMENT No. II.

The Court erred in denying defendant's motion to strike all of plaintiff's second amended complaint from the files for the following reason:

In plaintiff's second amended complaint he abandons entirely his cause of action under the common law and seeks recovery entirely under the Employers' Liability Law of the State of Arizona. As shown in Assignment No. I, it is our theory that the plaintiff was precluded from bringing his action under the Employers' Liability Law and for that reason his second amended complaint was surplusage and should have been stricken out.

#### ASSIGNMENT No. III.

The Court erred in denying defendant's motion to strike from the files plaintiff's third amended complaint for the following reason:

Such third amended complaint seeks recovery under the Employers' Liability Law. The only difference between the second amended complaint and the third amended complaint is a change in the amount sought and some difference in the injuries alleged to have been sustained. As stated in former [59] assignments, our contention is that

the plaintiff is precluded from bringing his action under the Employers' Liability Law and therefore his third amended complaint constitutes mere surplusage and should have been stricken.

#### ASSIGNMENT No. IV.

The Court erred in overruling defendant's objection to the introduction by the plaintiff of any testimony under said third amended complaint for the reason that said objections were specifically based upon the ground that the plaintiff having instituted suit against the defendant under the common law had made his election to pursue such remedy exclusively and was precluded from recovery under said third amended complaint which, as above shown, was based upon the Employers' Liability Law of the State of Arizona.

#### ASSIGNMENT No. V.

The Court erred in refusing to give the following instruction requested by the defendant:

The plaintiff having failed to prove his case,  
you are instructed to return a verdict for the  
defendant

for the following reason:

The plaintiff announced at the opening of the case that he was proceeding to trial upon the third amended complaint, and in truth and in fact did proceed during the trial upon said third amended complaint, which said amended complaint was, as above shown, based upon the Employers' Liability Law of the State of Arizona and not upon the common law liability.

That the plaintiff having offered no evidence in support of his action originally instituted under the



common law should not be permitted to recover under 'proof of facts set forth in his complaint based upon the Employers' Liability Law, for the reason that under our theory of the case plaintiff was precluded from pursuing any remedy other than [60] that originally adopted and therefore the Court erred in refusing the instruction for a directed verdict.

#### ASSIGNMENT No. VI.

The Court erred in instructing the jury in the following language:

The action is based upon what is known as the Arizona Employers' Liability Act.

Under the Arizona Employers' Liability Act, the plaintiff, in order to recover, must show; first, that the plaintiff was in the employ of the defendant; second, that the master was engaged in one of the hazardous occupations which I will explain to you by reading the Arizona statutes upon the subject, and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Under the law of the State of Arizona, the Employers' Liability Act, the labor and service of a workman at manual and mechanical labor in the employment of any person, firm, association, company or corporation in mills, shops, works, yards, plants and factories where steam, electric or any other mechanical power is used to operate machinery and appliances in and about such premises is service in a haz-

ardous occupation within the meaning of said Employers' Liability Act. The Employers' Liability Act covers other occupations, but you are concerned solely with the question as to whether or not the plaintiff was employed by the defendant and engaged in labor and service in and about a plant, works or yards where mechanical power was used to operate machinery and apparatus in and about such premises.

and in further instructing the jury as follows:

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Employers' Liability Act, that law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any injury is proved, was caused by an accident due to the negligence of the master (defendant). In other words, in this case, in order to entitle the plaintiff to recovery, it is not necessary that the plaintiff should prove that the defendant, Twohy Brothers, was negligent in some manner or form.

and in further instructing the jury as follows:

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on or about the 25th day of March, [61] 1921, the plaintiff, Walter Rogers, was in the employ of and was employed by the defendant, Twohy Brothers, at and in their

mill, shop, works, yard, plant or factory where mechanical power was used, as heretofore stated and defined in the Employers' Liability Act of Arizona, and that his duty under such employment required him to be in and about such place and in the performance of his duty under such employment the said Walter Rogers, without any negligence on his part, received any personal injury, as alleged in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment and was due to a condition or conditions of plaintiff's occupation or employment, then the Court instructs you that under those facts, if you find them to be facts, that plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

for the reason that all of the foregoing instructions are based upon the Employers' Liability Law. The plaintiff having brought his action originally under the common law and by so doing having elected to pursue such remedy exclusively is not entitled to a recovery under the Employers' Liability Law. The foregoing instructions being based entirely upon the Employers' Liability Law and directing a recovery upon proof of such facts were erroneous.

[Endorsed]: No. L-274—Phx. Petition for Writ of Error and Assignments of Error. Filed.

July 13, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.

Service of Copy of within instruments hereby acknowledged this 13th day of July, 1923.

SPENCER B. PUGH and

FRED C. BOLEN,

Attorneys for Plaintiff. [62]

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In the District Court of the United States, in and  
for the District of Arizona.

No. L-274 (PHOENIX).

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Writ of Error.**

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between Walter Rogers, plaintiff, and the Twohy Brothers Company, a corporation, defendant, manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit Court within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of July, 1923, and of the Independence of the United States the one hundredth and forty-eighth.

[Seal]

C. R. McFALL,  
Clerk.

By Paul Dickason,  
Chief Deputy Clerk.

[Endorsed]: Filed July 24, 1923. C. R. McFall, Clerk.

### **Return on Writ of Error.**

The answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error.

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]

C. R. McFALL,  
Clerk U. S. District Court for the District of  
Arizona.

By M. R. Malcolm,  
Deputy. [63]

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In the District Court of the United States for the  
District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that on or about the twenty-first day of May, 1921, the record on removal from the Superior Court of the State of Arizona in and for the County of Maricopa to the United States District Court for the District of



Arizona in the above-entitled cause was filed with the Clerk of said United States District Court.

That among the records so filed as aforesaid was the complaint of the plaintiff originally filed in said Superior Court of Maricopa County, Arizona. That said complaint sought a recovery for damages alleged to have been suffered by the plaintiff by reason of certain personal injuries alleged to have been received while in the employ of the defendant and said complaint was based upon the alleged negligence of the defendant and sought a recovery against said defendant under what is known as the "common law" liability for negligence. That attached hereto and marked Exhibit "A," is a copy of said original complaint so removed from the Superior Court of Maricopa County, Arizona, as aforesaid.

That thereafter, to wit, on or about the twenty-first day of May, 1921, said plaintiff by his attorney filed with the Clerk of said United States District Court what was designated "First Amended Complaint" wherein the plaintiff [64] set forth two alleged causes of action against the defendant; the first, based upon the common law liability of the defendant for negligence, and the second, based upon what is known as the Employers' Liability Law of the State of Arizona. That attached hereto and marked Exhibit "B," is a copy of said first amended complaint filed by said plaintiff.

That thereafter, to wit, on or about the seventeenth day of June, 1921, the defendant, by its attorney, filed with the Clerk of said United States

District Court its motion to strike from the files the second cause of action of said first amended complaint upon the ground and for the reason that the plaintiff having filed his original complaint setting forth a cause of action under the common law had, under the laws of the State of Arizona, elected to pursue his remedy at common law to the exclusion of all other remedies.

That thereafter, and on or about the eighth day of October, 1921, at a stated term of the above-entitled court begun and holding in the city of Phoenix in and for the District of Arizona before his Honor, Wm. H. Sawtelle, District Judge, said motion to strike was argued and submitted to the Court upon said argument, the affidavits, papers and files on file in said cause.

That thereafter and on the seventeenth day of October, 1921, and at said term of court, the Court made its order overruling defendant's motion to strike the second cause of action of plaintiff's first amended complaint, and further ordered that the plaintiff be granted leave to amend his complaint as of May 21, 1921, by adding the second cause of action under the Employers' Liability Law of the State of Arizona, said amendment being allowed upon the statement of counsel for plaintiff that he would proceed to trial upon said second cause of action, to which ruling [65] of his Honor, the said Judge, the defendant then and there prayed a bill of exceptions and his Honor, the said Judge, sealed the exception accordingly. That attached hereto and

marked Exhibit "C," is a copy of said Order so made as aforesaid.

BE IT FURTHER REMEMBERED that on or about the twelfth day of December, 1921, the plaintiff filed with the Clerk of said United States District Court his notice of motion for leave to amend, a copy of said notice being attached hereto marked Exhibit "D"; also his motion for leave to amend, a copy of said motion being attached hereto and marked Exhibit "E"; also his affidavit in support of said motion, a copy of said affidavit being attached hereto and marked Exhibit "F"; also a proposed second amended complaint, a copy of said complaint being attached hereto and marked Exhibit "G."

That on said twelfth day of December, 1921, at a stated term of the above-entitled court begun and holding in the city of Phoenix in and for the District of Arizona, His Honor, Wm. H. Sawtelle, District Judge, by an order duly entered, granted said motion to amend, and on said date said amended complaint was filed in the office of the Clerk of said United States District Court, to which order and ruling of His Honor, the said Judge, the defendant then and there prayed a bill of exceptions, and His Honor, the said Judge, sealed the exception accordingly.

That thereafter and on or about the twentieth day of December, 1921, the defendant filed with the Clerk of said United States District Court its motion to strike the whole of plaintiff's second amended complaint from the files upon the ground

that theretofore and on or about the twenty-first day of April, 1921, in the Superior Court of [66] the State of Arizona, in and for the county of Maricopa, the plaintiff had filed his complaint in said action and had therein set up a course of action under the common law and that at said time the said plaintiff had failed to set up or to file any cause of action under the Employers' Liability Law of the State of Arizona. That by filing his original complaint under the common law the plaintiff elected to pursue his remedy at common law to the exclusion of all other remedies.

That thereafter and on the eleventh day of April, 1922, the said Judge of said Court by an order duly entered, denied said motion to strike from the files said second amended complaint, to which ruling the defendant then and there prayed a bill of exceptions and His Honor, the said Judge, sealed the exception accordingly.

BE IT FURTHER REMEMBERED that on to wit, the twenty-first day of May, 1923, at a stated term of the above-entitled court begun and holding in the city of Phoenix in and for the District of Arizona, before His Honor, Fred C. Jacobs, District Judge, the issue joined in the above-stated cause between said parties came on to be tried before said Judge and a jury; the plaintiff being represented by Fred C. Bolen, Esq., his attorney, and Spencer B. Pugh, Esq., of counsel; and the defendant being represented by Paul G. McIver, Esq., its attorney, and George Purdy Bullard, Esq., of counsel, and

at the opening of the trial thereof the following proceedings were had:

Mr. Pugh, of counsel for plaintiff, announced that the plaintiff was proceeding under his third amended complaint on file in said action, whereupon Mr. Bullard of counsel for defendant objected on behalf of said defendant to the introduction of any evidence under said third amended complaint [67] upon the ground that the action as originally commenced in the Superior Court of Maricopa County, Arizona, was based upon the alleged negligence of the defendant and sought a recovery upon the theory of negligence and that subsequently the complaint was amended in such manner that it now, under plaintiff's third amended complaint, seeks a recovery under what is known as the Employers' Liability Law of the State of Arizona. That under the provisions of said Employers' Liability Law as construed by the Supreme Court of the State of Arizona, the bringing of an action constitutes an election of the remedy to be pursued and that as soon as such an election is made it becomes conclusive upon the plaintiff and may not be revoked by him and and that, therefore, the plaintiff should not be permitted to proceed under said third amended complaint nor to recover under the Employers' Liability Law of the State of Arizona.

Mr. Bullard further announced at said time that in order to preserve the record that he would object upon the offering of any testimony by the plaintiff. Whereupon WALTER ROGERS, the plaintiff, was called and sworn as a witness, and the following questions asked:



**Testimony of Walter Rogers, in His Own Behalf.**

Q. Your name is Walter Rogers?     A. Yes, sir.

Q. You are the plaintiff in this case?

Mr. BULLARD.—One moment if the Court please, we desire to object to the introduction of any evidence under this amended complaint upon the ground that the action was first brought under the common law and the plaintiff failed to proceed under that remedy, and further, upon the ground that the amended complaint does not state a cause of action under the Employers' Liability Act.

The COURT.—Your objection is overruled.

Mr. BULLARD.—To which we may take an exception?

The COURT.—Yes, you may note an exception.

Mr. BULLARD.—And it may be considered that the same general objection goes to all the testimony that may be introduced and Your Honor will make the [68] same ruling and we may have the same exception?

The COURT.—It may be so considered without repeating the objection to the testimony.

BE IT FURTHER REMEMBERED that on or about the twenty-fifth day of May, 1923, at the close of the above-entitled cause and before the submission thereof to the jury and before the Court had instructed the jury, the defendant requested the Court that he instruct the jury as follows:

“The plaintiff having failed to prove his case, you are instructed to return a verdict for the defendant.”



but at said time and place the said Judge, the Honorable Fred C. Jacobs, did rule that said instruction was not applicable to the law or to the evidence and did reject said instruction and did refuse to give the same, whereupon, the said defendant did then and there pray a bill of exceptions to said ruling and His Honor, the said Judge, did grant an exception thereto.

BE IT FURTHER REMEMBERED that at the close of the case and before the same had been submitted to the jury, the Court instructed the jury as follows:

The action is based upon what is known as the Arizona Employers' Liability Act.

Under the Arizona Employers' Liability Act, the plaintiff, in order to recover, must show, first, that the plaintiff was in the employ of the defendant; second, that the master was engaged in one of the hazardous occupations which I will explain to you by reading the Arizona statutes upon the subject, and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Under the law of the State of Arizona, the Employers' Liability Act, the labor and service of a workman at manual and mechanical labor in the employment of any person, firm, association, company or corporation in mills, shops, works, yards, plants and factories where steam, electric or any other mechanical power is used to operate machinery and appliances in and

about such premises is service in a hazardous occupation within the meaning of said Employers' Liability Act. The Employers' Liability Act covers other occupations but you are concerned solely with the question as to whether or not the [69] plaintiff was employed by the defendant and engaged in labor and service in and about a plant, works or yards where mechanical power was used to operate machinery and apparatus in and about such premises.

and as follows:

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Employers' Liability Act, that law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any injury is proved, was caused by an accident due to the negligence of the master (defendant). In other words, in this case, in order to entitle the plaintiff to recovery, it is not necessary that the plaintiff should prove that the defendant, Twohy Brothers, was negligent in some manner or form.

and as follows:

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on or about the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of and was employed by the de-

fendant, Twohy Brothers, at and in their mill, shop, works, yard, plant or factory where mechanical power was used, as heretofore stated and defined in the Employers' Liability Act of Arizona, and that his duty under such employment required him to be in and about such place, and in the performance of his duty under such employment the said Walter Rogers, without any negligence on his part, received any personal injury as alleged in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment and was due to a condition or conditions of plaintiff's occupation or employment, then the court instructs you that under those facts, if you find them to be facts, that plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

to which instructions the defendant then and there prayed a bill of exceptions and His Honor, the said Judge, sealed the exception accordingly.

BE IT FURTHER REMEMBERED that on the thirty-first day of May, 1923, the defendant filed its motion for a new trial in said cause whereby the said defendant did move the Honorable Court to set aside and vacate the verdict of the jury and to grant a new trial upon the following grounds and for the following causes, to wit: [70]

1. That the Court erred in admitting evidence over the objection of the defendant and excepted to by the defendant.

2. That errors of law occurred at the trial and during the progress of the cause.

3. That the Court erred in instructing the jury.

4. That the Court erred in refusing instructions requested by the defendant.

5. That the verdict is not justified by the evidence and is contrary to law.

and that on the second day of June, 1923, it was ordered by the Court that the said defendant's motion for a new trial be denied, to which order of His Honor, the said Judge, the defendant then and there prayed a bill of exceptions and His Honor, the said Judge, sealed the exception accordingly.

\* \* \* \* \*

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose and the same having been examined by me and found to be correct, the same is now on this 24th day of July, 1923, duly signed, approved and allowed.

F. C. JACOBS,  
Judge. [71]

**Exhibit "A."**

(COPY)

In the Superior Court of the State of Arizona, in  
and for the County of Maricopa.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**COMPLAINT.**

Now comes the plaintiff and for a cause of action  
against the defendant, complains and alleges:

**I.**

That defendant is now, and was at the time and  
times hereinafter mentioned, a corporation duly  
incorporated under the laws of the State of Arizona,  
and doing business as such corporation in the  
County of Maricopa and State aforesaid.

**II.**

That the plaintiff is a resident of the County of  
Maricopa, and was at the times hereinafter men-  
tioned a resident of said county and state.

**III.**

That defendant company was, at the times here-  
inafter mentioned, engaged in the construction and  
building of public highways in the County of Mari-  
copa, to wit; that certain portion of the public  
highway known as the Indian-School Road and at

a point about three miles east of what is known as the "West End Store," and being situate at an [72] appropriate distance of about twelve miles, more or less, west of the city of Phoenix, county of Maricopa, state of Arizona.

#### IV.

That on and prior to the 25th day of March, 1921, plaintiff was an employee of said defendant company; that plaintiff's dailey duties of said employment with said defendant company, were to assist in connecting and making fast what is called and known in said business, a bale, to cars or buckets loaded with sand, gravel and cement, and to assist in guiding said bale and holding same in its proper place and position while said sand, gravel and cement, was being unloaded into what is known and called a skiff, and used for the conveyance of said sand, gravel and cement, to what is known and called the mixer.

#### V.

That on or about the 25th day of March, 1921, and while plaintiff was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without any fault, carelessness or negligence whatever upon the part of plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; it did then and there at said time and place fail and neglect to properly place and locate said bale and said mixer in said highway, as aforesaid; that plaintiff was compelled to, in the performance of his regular duties and employment, as



aforesaid, to push, haul and pull upon said bale, as to then and there, and at said time and place, receive great and severe bodily strain and internal injuries, to wit, a sprained back, a dislocation of the 5th lumbar vertebra and a severe rupture and hemorrhoids. [73]

## VI.

That by reason of the said injuries so received as aforesaid, plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries, and as a consequence thereof, plaintiff has been and now is, sick, sore and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain and anguish, and that he has been and now is unable to engage in any occupation to earn a livelihood whatsoever, and will forever remain maimed and crippled, and thereby incurring great loss and damage to the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and on account of said injuries, as aforesaid, plaintiff has been further damaged in the sum of \$200.00 expended for medical services and treatment, such services and treatment being necessary for the relief of the pain and bodily suffering caused by said injuries; that plaintiff has been damaged by reason of the extreme physical pain, suffering and mental anguish due to said injuries.

That by reason of said injuries so received, as aforesaid, plaintiff has been permanently injured and forever *hindred* from following his usual voca-

tion and from engaging in any means of livelihood, to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the defendant company in the sum of \$20,000.00 and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

[Endorsed]: No. 14149. Filed Apr. 23, 1921. Claude S. Berryman, Clerk. By Angie P. Byrne, Deputy.

[Endorsed]: No. L-274—Phx. Filed May 21, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [74]

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**Exhibit "B."**

(COPY)

In the United States District Court, in and for the  
District of Arizona.

No. —.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**FIRST AMENDED COMPLAINT.**

Now comes the plaintiff herein and for a cause of action against the defendant, complains and alleges:

I.

That plaintiff is a resident of Maricopa County, State of Arizona.

II.

That defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the county of Maricopa, and state aforesaid.

III.

That said defendant company was, at the times hereinafter mentioned, engaged in the building and construction of public highways in the county of Maricopa, to wit; that portion of the public highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the [75] County of Maricopa, and State of Arizona.

IV.

That on and prior to the 25th day of March, 1921, plaintiff herein was an employee of said defendant company; that plaintiff's duties of employment with said company, were in part, to assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one car or bucket attached thereto, in its proper

place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being used to convey said sand, gravel and cement, to what is known and called in said business the "mixer." That plaintiff was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

V.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without fault, carelessness or negligence upon the part of plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; it then and there so carelessly and negligently located and placed the machinery hereinbefore designated as the "bale," in paragraph IV herein, as to require of this plaintiff in the regular performance of his duties, to push, to haul, and pull upon said bale then and there connected and attached to said car or bucket loaded with sand, gravel and cement, as aforesaid, and to use unnecessary [76] and severe bodily strength and physical strain, to make and complete the required and necessary connection between said bale and said skiff that was so required for the unloading of said sand, gravel and cement into said skiff to be conveyed to the said mixer, as hereinbefore mentioned. That the improper location and adjustment of the

said bale and machinery at said time and place as aforesaid, was the direct and proximate cause of plaintiff then and there receiving great and severe bodily strain and severe internal injuries, to wit, a sprained back, a dislocation of the vertebra, a severe rupture and hemorrhoids.

## VI.

That by reason of said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries, to wit, the 25th day of March, 1921, plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is, sick, sore, and in ill health; that he is unable to walk about without assistance and experiencing extreme bodily pain, and that he has been and now is unable to engage in any occupation to earn a livelihood, and will forever be maimed and crippled thereby incurring great loss and damage to this plaintiff in the sum of Ten Thousand Dollars (\$10,000.00).

That by reason and on account of said injuries, as aforesaid, this plaintiff has been further damaged in the sum of Five Hundred Dollars (\$500.00) expended for medical services, nursing and treatment, said medical services, nursing and treatment being required and necessary for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, this plaintiff has been permanently injured [77] and forever *hindred* from following



his usual vocation to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

Comes now the above-named plaintiff, Walter Rogers, by his attorney, and for a second and further cause of action against the defendant, Twohy Bros. Company, a corporation, complains and alleges:

I.

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

II.

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the County of Maricopa, and State aforesaid.

III.

That on and prior to the 25th day of March, 1921, said defendant Company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used



and operated in the building and construction of public highways in the county of Maricopa, to wit; That portion [78] of the public highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona.

#### IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said Bale, with one of said cars or buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there used to convey said sand, gravel and cement to and into, what is known as and called in said business the "mixer." That plaintiff herein was so engaged in such duties of employment at the

time of the accident and injury hereinafter described.

### V.

That the said occupation in which said plaintiff, Walter Rogers, was employed at said time and place, as aforesaid, was hazardous as declared and determined by subdivision (10), of Section 3156, Chapter VI, Civil Code of Arizona, under [79] which this action is instituted, and that said occupation was hazardous in fact.

### VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in Paragraph IV herein, and to use severe bodily strength and physical strain, to make and complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel

and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while the plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit: pushing, pulling and hauling upon said bale, which said bale was then and there connected with said car or bucket loaded with sand, [80] gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit, a sprained back, slight dislocation of the vertebra, a severe rupture, and hemorrhoids.

## VII.

That by reason of the said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain; that ever since the date of said accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000).

That by reason and on account of said accident and injuries, as aforesaid, plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, nursing and treatment, such medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received plaintiff has been permanently injured and forever hindered from following his usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00), and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

[Endorsed]: Filed May 21, 1921. C. R. McFall,  
Clerk. By Clyde C. Downing, Chief Deputy Clerk.  
[81]

**Exhibit "C."**

(COPY.)

In the District Court of the United States in and  
for the District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corpora-  
tion,

Defendant.

Plaintiff filed his complaint against the defendant in the state court, setting up a cause of action under the common law. Thereafter the defendant removed said cause to this Court. After it was so removed plaintiff, without leave of the Court, filed an amended complaint by adding thereto a count under the Employers' Liability Law of this state. Defendant has moved this Court to strike all of the second cause of action of the plaintiff's first amended complaint from the files on the following grounds: (1) That the complaint, as originally filed in the state court set up a cause of action under the common law; (2) That the plaintiff in so filing his said complaint in the said state court, made his election to pursue his remedy under the common law to the exclusion of all other laws.

The question is whether the mere filing of said original complaint in the state court constituted an

election on the part of said plaintiff. Defendant relies upon Section 3176 of the Revised Statutes of Arizona, 1913, which is as follows:

“Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon [82] the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.” Paragraph 3.

And also upon the cases of Consolidated Arizona Smelting Company vs. Ujack, 15 Arizona Reports 382, and Calument and Arizona Mining Company vs. Chambers, 20 Arizona 54. In neither of these cases did the question of the right of plaintiff to amend arise and I cannot believe that either the Legislature or the Supreme Court of Arizona intended to hold that the mere filing of a complaint in which only one cause of action was set forth was an election which would thereafter prevent the plaintiff from amending his complaint, by leave of the Court, and setting forth another cause of action under the Arizona law.

It is true that if the plaintiff elects to pursue a remedy under either one of the statutes he thereby is excluded from pursuing a remedy under any other statute but I think that the decisions and the



statutes referring to election of remedies mean an election made after the case is at issue and not before the Court's rights to allow amendments to the complaint is passed. I believe the plaintiff would have been permitted under the law to amend his complaint in the state court. If so, why should he not be permitted to amend in this court. The Arizona statutes regulating amendments of pleadings are very liberal and Courts should not be too technical in allowing amendments of pleadings, especially where the opposite party has suffered no inconvenience or been placed at no disadvantage.

It is, therefore, ORDERED that the plaintiff be and is hereby granted leave to amend his complaint, as of [83] May 21st, 1921, by adding the second cause of action under the Employers' Liability Law of Arizona and that the defendant's motion to strike said second cause of action from the files be and the same is hereby overruled.

IT IS FURTHER ORDERED that defendant's demurrer to said second cause of action be and the same is hereby overruled. Plaintiff's counsel stated in argument that if the Court allowed the amendment to the complaint by adding thereto the said second cause of action plaintiff would elect to proceed to trial on said second cause of action.

Dated at Tucson, Arizona, this 17th day of October, A. D. 1921.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Filed Oct. 17, 1921. C. R. McFall,  
Clerk. [84]

**Exhibit "D."**

(COPY.)

In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

NOTICE OF MOTION FOR LEAVE TO  
AMEND.

To Twohy Bros. Company, Messrs. Bullard &  
Jacobs, and McIver, Esqs. their Attorneys.

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned, will move the Court, at the courtroom thereof, at Phoenix, Arizona, on the 14th day of December, 1921, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his first amended complaint herein, by the insertion of the following words, to wit:

*Severe injuries to the Vertebral Column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also—*After the word to wit: on line four, of page four, and the insertion of the following words, *about without ex-*

*periencing severe bodily fatigue; After the word walk, on line seventeen, of page four thereof, and for such other and further relief as may be just.*

FRED C. BOLEN,  
Attorney for Plaintiff.

Dated this 14th day of December, 1921. [85]

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**Exhibit "E."**

(COPY.)

In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**MOTION FOR LEAVE TO AMEND.**

Comes now the plaintiff, in the above-entitled cause, by his attorney Fred C. Bolen, and moves this Court for an Order for leave to amend his first amended complaint on file herein by the insertion of the following words, to wit:

*Severe injuries to the Vertebral Column, more particularly to the lumber, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also—After the word to wit; on line four, of page four, and leave*

to insert the following words, to wit; *about without experiencing severe bodily fatigue*; After the word walk, on line seventeen, of page four thereof.

FRED C. BOLEN,  
Attorney for Plaintiff.

Dated this 14th day of December, 1921. [86]

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**Exhibit "F."**

(COPY.)

In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**AFFIDAVIT.**

Fred C. Bolen, being first duly sworn, deposes and says: that he is the attorney for the plaintiff, Walter Rogers, in the above-entitled action; that he is more familiar with the matters herein stated than said plaintiff and makes this affidavit for and in his behalf; that said action was commenced in the Superior Court of Maricopa County, State of Arizona, on the 21st day of April, 1921, and was transferred to this court by the said defendant Company, on the 21st day of May, 1921, and is brought for the

purpose of recovery of damages for personal injuries alleged to have been received and sustained by the plaintiff, Walter Rogers, while in the service and employ of the said defendant Company. That issue has been joined and the cause is now upon the Calendar of this Court awaiting trial.

That it becomes necessary for the plaintiff to file an amended complaint in this action, for the following reasons, to wit:

That on or about the 3d day of November, 1921, and upon the application filed in this Court by said defendant Company, and under and by virtue of Chapter 131 of the [87] Session Laws of Arizona, 1921, authorizing and empowering Courts in personal injury cases to order and direct a physical examination of the person injured, this Court entered an order appointing and directing Dr. Coit Hughes, of Phoenix, Arizona, to make a physical examination of the plaintiff, Walter Rogers, on behalf of the defendant, Twohy Bros. Company. That on the 25th day of November, 1921, said examination was had and X-Ray Photos made—plaintiff's alleged injuries. That the said X-Ray photo so taken of the plaintiff's "Vertebra Column," have enabled affiant to more specifically set forth in the proposed second amended complaint the injuries alleged to have been so received by said plaintiff.

That the plaintiff and this affiant *was* ignorant of the facts as herein stated when his former complaint herein was filed in this Court.

FRED C. BOLEN.

Subscribed and sworn to before me this 14th day of December, 1921.

[Notarial Seal]

SPENCER B. PUGH.

Notary Public.

My commission expires 10-30-1922. [88]

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**Exhibit "G."**

(COPY.)

In the United States District Court in and for the  
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,  
Defendant.

**SECOND AMENDED COMPLAINT.**

Comes now the above-entitled plaintiff, Walter Rogers, by his attorney, Fred C. Bolen, and for a cause of action against the defendant, Twohy Bros. Company, a Corporation, complains and alleges:

**I.**

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

**II.**

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the Laws of the State of Arizona, and



doing business as such corporation in the county of Maricopa, and State aforesaid.

### III.

That on and prior to the 25th day of March, 1921, said defendant Company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used [89] and operated in the building and construction of Public Highways in the county of Maricopa, to wit; That portion of the public highway known as the Indian Road and at a point about three miles East of what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona.

### IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one of said cars or

buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there used to convey said sand, gravel and cement, to and into what is known as and called in said business the "mixer." That plaintiff herein was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

#### V.

That the said occupation in which said plaintiff Walter Rogers, was employed at said time and place, as [90] aforesaid, was hazardous as declared and determined by subdivision (10), of Section 3156, Chapter VI, Civil Code of Arizona, under which this action is instituted, and that said occupation was hazardous in fact.

#### VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant Company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to

push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in Paragraph IV herein, and to use severe bodily strength and physical strain, to make and complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while this plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit; pushing, pulling and hauling upon said bale, which said bale was [91] then and there connected with said car or bucket loaded with sand, gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit; Severe injuries to the vertebral column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also rupture and hemorrhoids.

## VII.

That by reason of the said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date

of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk about without experiencing severe bodily fatigue; that ever since the date of said accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and account of said accident and injuries, as aforesaid, plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, nursing and treatment, such medical services nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, plaintiff has been permanently injured and forever hindered from following his usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00). [92]

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) Dollars, and for his costs herein incurred.

FRED C. BOLEN,  
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 12, 1921. C. R. McFall,  
Clerk. By Clyde C. Downing, Chief Deputy Clerk.

[Endorsed]: No. L-274—Phx. Bill of Exceptions. Service of Copy of Within Instrument Hereby Acknowledged this 13th day of July, 1923. Spencer B. Pugh, Fred C. Bolen, Attorneys for Plaintiff. Filed July 13, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [93]

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In the District Court of the United States for the  
District of Arizona.

No. L-274—Phx.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Order Granting Writ of Error and Fixing Super-  
sedeas and Appeal Bond.**

Upon the application of the defendant, by its attorneys, Richard E. Sloan, C. R. Holton and E. G. Scott, for the allowance of a writ of error on the assignments of error intended to be urged by them, praying also that a transcript of the record, proceedings and papers, as well as the judgment entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises;

IT IS HEREBY ORDERED that a writ of error to said United States Circuit Court of Ap-



peals for the Ninth Circuit be and the same is hereby allowed and that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated this 24th day of July, 1923.

F. C. JACOBS,  
Judge.

[Endorsed]: No. L-274—Phx. Order granting Writ of Error and Fixing Supersedeas and Appeal Bond. Filed July 24, 1923. C. R. McFall, Clerk. [94]

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In the District Court of the United States for the  
District of Arizona.

No. L-274—Phx.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Supersedeas and Appeal Bond.**

KNOW ALL MEN BY THESE PRESENTS, that we, TWOHY BROTHERS COMPANY, a corporation, as principal, and HARTFORD ACCI-



DENT AND INDEMNITY COMPANY, a corporation, as surety, are held and firmly bound unto Walter Rogers, plaintiff in the above-entitled action in the sum of SEVEN THOUSAND FIVE HUNDRED (\$7,500.00) DOLLARS, lawful money of the United States to be paid to him, his heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this fourteenth day of July, 1923.

WHEREAS, the above-named Walter Rogers has obtained a judgment against the above-named defendant, Twohy Brothers Company, in the above-entitled court in the sum of Five Thousand Three Hundred Eighteen and 95/100 Dollars (\$5,318.95); and

WHEREAS, the above-named Twohy Brothers Company has prosecuted a writ of error to the Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of said United States District Court for the District of Arizona in the above-entitled cause; and [95]

WHEREAS, the Court has fixed the bond on appeal at the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) and ordered that the same shall operate as a supersedeas.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Twohy Brothers Company shall prosecute its said writ of error and if it shall fail to make its plea good shall

answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and effect.

TWOHY BROTHERS COMPANY,  
By Richard E. Sloan, C. R. Holton, and E. G.  
Scott, and George Purdy Bullard and Paul  
G. McIver,

Its Attorneys.

HARTFORD ACCIDENT AND  
INDEMNITY COMPANY,

[Corporate Seal] By Samuel White,  
Its Attorney in Fact.  
By H. F. Bringhurst,  
Its Attorney in Fact.

[Endorsed]: No. L-274—Phx. Supersedeas  
and Appeal Bond. Filed July 16, 1923. C. R.  
McFall, Clerk. By Chas. H. Adams, Deputy Clerk.

Service of copy of within bond hereby acknowl-  
edged this 16th day of July, 1923.

SPENCER B. PUGH,  
FRED C. BOLEN,  
Attorneys for Plaintiff. [96]

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In the District Court of the United States, in and  
for the District of Arizona.

L-274—(PHOENIX).

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Citation on Writ of Error.**

The President of the United States to Walter Rogers, and Fred C. Bolen and S. B. Pugh, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the Twohy Brothers Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 24th day of July, 1923, and of the Independence of the United States the one hundred and forty-eighth.

F. C. JACOBS,  
United States District Judge for the District of Arizona.

**UNITED STATES MARSHAL'S RETURN.**

I received this writ at Phoenix, Arizona, July 25, 1923, and executed the same by delivering a true copy hereof to Fred C. Bolen, Attorney of Record

for the above-named Plaintiff, Walter Rogers, who was designated as the person upon whom service should be made by R. E. Sloan, one of the Attorneys for the Defendant, Twohy Bros. Company.

T. J. SPARKES,

U. S. Marshal.

By T. E. Benton,

Deputy.

[Endorsed]: Filed July 26, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [97]

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In the District Court of the United States for the  
District of Arizona.

No. L-274—Phx.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,  
Defendant.

**Praeipice for Transcript of Record.**

To C. R. McFall, Clerk of the above-entitled Court:

Kindly prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause containing the following portions of the record in said cause:

Transcript on removal from the Superior Court of Maricopa County, Arizona, to the United States District Court for the District of Arizona;

Plaintiff's first amended complaint;

Defendant's demurrer and answer to first amended complaint. Defendant's motion to strike, demurrer and answer to second cause of action;

Order dated October 17, 1921, allowing amendment to complaint by adding second cause of action;

Notice of motion to amend. Motion to amend. Affidavit of Fred C. Bolen and second amended complaint;

Defendant's motion to strike, demurrer and answer to second amended complaint;

Affidavit for leave to amend;

Notice of motion for leave to amend and plaintiff's third amended complaint;

Defendant's objections for leave to amend;

Affidavit of Paul G. McIver in support of objection to leave to amend; [98]

Instructions requested by the defendant;

Verdict of the jury;

Defendant's motion for a new trial;

Order fixing time for filing bill of exceptions;

Judgment;

Petition for writ of error;

Writ of error;

Bill of exceptions;

Assignments of error;

Order granting writ of error and fixing supersedeas and appeal bond;

Supersedeas and appeal bond;

Citation;

Praeipe for transcript of record.

Dated this 26th day of July, 1923.

RICHARD E. SLOAN,

C. R. HOLTON,

E. G. SCOTT,

G. P. BULLARD and

PAUL G. McIVER,

Attorneys for Defendant.

[Endorsed]: No. L-274—Phx. Praeipe for Transcript of Record. Filed July 26, 1923. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk.

Service of copy of within hereby acknowledged this 26th day of July, 1923.

SPENCER B. PUGH,

Attorney for Plaintiff. [99]

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In the District Court of the United States for the  
District of Arizona.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,

District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona do



hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Walter Rogers, plaintiff, versus Twohy Brothers Company, a corporation, defendant, said case being number Law 274-Phoenix on the docket of said court.

I further certify that the foregoing 100 pages numbered from 1 to 100, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to forty-five and 85/100 Dollars (\$45.85), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court, this 21st day of August, 1923.

[Seal]

C. R. McFALL,  
Clerk of the District Court of the United States, for  
the District of Arizona.

By M. R. Malcolm,  
Deputy Clerk.

[Endorsed]: No. 4081. United States Circuit Court of Appeals for the Ninth Circuit. Twohy Brothers Company, a Corporation, Plaintiff in Error, vs. Walter Rogers, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed August 23, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.